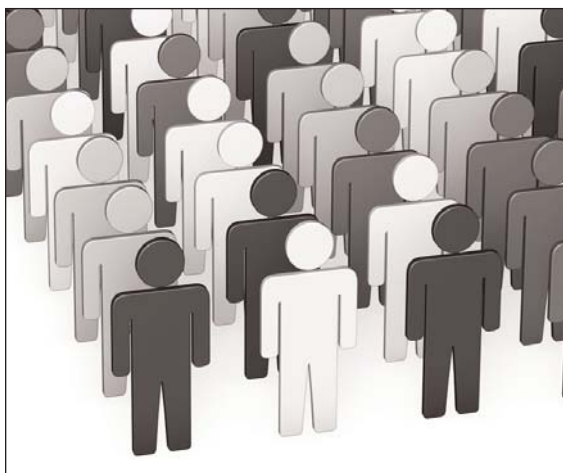


Classifying Employees for Unemployment Insurance Tax Purposes

Information for Employers



**DIVISION OF
EMPLOYMENT
SECURITY**

Determining whether a worker is an employee or independent contractor for Missouri unemployment insurance (UI) tax purposes is important for several reasons:

- Under Missouri law, wages paid by an employer to *employees* are subject to UI taxes by the employer.
- Only compensation paid to *employees* is used to calculate UI benefits should an employee become unemployed through no fault of his/her own.

Workers performing services fall into one of four categories:

1. A common law employee (worker defined as employee under common law).
2. An independent contractor (worker **not** defined as employee under common law).
3. A statutory employee.
4. A statutory exempt employee.

IMPORTANT: For UI tax purposes, only **common law employees** and **statutory employees** are employees.

Common Law Employees vs. Independent Contractors

Common law is a legal system used to determine whether a worker is an employee or independent contractor when the worker's status is not specifically defined by statute. It is the body of law developed primarily from

judicial decisions based on custom and precedent, unwritten in statute or code. These rules hold that a worker's status as an employee or an independent contractor hinges on the alleged employer's right to control the worker. Anyone who performs a service for wages is an employee if the employer can control what will be done and how it will be done. If an employer/employee relationship exists, it does not matter what the worker or the relationship is called. The employee may be called an agent or contract labor. It does not matter how payments are measured or paid, what the payments are called, or if the employee works full or part time. Under the Missouri Employment Security Law, an individual may not waive his/her rights to UI coverage.

The DES applies the twenty-factor test originally developed by the Internal Revenue Service (IRS) to determine whether particular workers are employees or independent contractors. The twenty-factors do not serve as a bright-line rule to be applied without flexibility, but rather are guides or aids to be used in determining the nature of the employment relationship. They will not necessarily be the only factors to consider in a particular case. No single factor is conclusive, and some factors may be more important than others depending on the industry involved and the context in which the services

are performed. The focus of the DES inquiry is the degree to which the employer has the right to control the manner and means of a worker's performance. The factors providing evidence of the degree of control and independence generally fall into three categories: behavioral control, financial control, and the type of relationship between the parties. Written contracts also are utilized as they describe the relationship the parties intended to create.

A Missouri court, in *National Heritage Enterprises, Inc. v. Division of Employment Sec.*, 164 S.W.3d 160, 167-74 (Mo. App. W.D. 2005), has identified and described the twenty factors as follows:

- 1. Instructions.** A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This behavioral control factor is present if the person or persons for whom the services are performed has the right to require compliance with the instructions. With respect to the "instructions" factor, the right to control is manifested in control over the "when, where, and how" work is completed.
- 2. Training.** Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the

worker to attend meetings, or by using other methods, indicates the person or persons for whom the services are performed want the services performed in a particular method or manner.

3. **Integration.** Integration of the worker's services into the business operations generally shows the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer/employee relationship.
4. **Services Rendered Personally.** If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as the results.
5. **Hiring, Supervising, and Paying Assistants.** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor

generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

- 6. Continuing Relationship.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.
- 7. Set Hours of Work.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
- 8. Full Time Required.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing

other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.

9. Doing Work on Employer's Premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require employees perform such services on the employer's premises. Control over the work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

10. Order or Sequence Set. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that

factor shows the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person for whom the services are performed.

11. Oral or Written Reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

12. Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of giving a lump sum agreed upon as the cost of the job. Payment made by the job or on a straight commission generally indicates the worker is an independent contractor. However, it is common in some professions, such as law, to pay independent contractors hourly.

13. Payment of Business and/or Traveling Expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to

regulate and direct the worker's business activities. Employees may incur **some** unreimbursed expenses in connection with the services they perform for the business; however, independent contractors are more likely to have unreimbursed expenses than employees. Fixed, ongoing costs that are incurred regardless of whether work currently is being performed are especially important.

14. Furnishing Tools and Materials.

The fact that the person or persons for whom the services are performed furnished significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

15. Significant Investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as maintenance of an office rented at fair market value from an unrelated party), that factor tends to indicate the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special

scrutiny is required with respect to certain type of facilities, such as home offices.

- 16. Realization of Profit or Loss.** A worker who can realize a profit or loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor.
- 17. Working for More Than One Firm at a Time.** If a worker performs more than de minimus services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement. The extent to which the worker makes services available to the relevant market shows the degree the business has the right

to control the business aspects of the worker's job.

- 18. Making Services Available to the General Public.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
- 19. Right to Discharge.** The right to discharge a worker is a factor indicating the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.
- 20. Right to Terminate.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer's employee relationship.

Statutory Employees

Some categories of workers who may be independent contractors under the

common law legal system are treated by statute as employees. The Missouri Employment Security Law names the following two types of statutory employees:

- Agent or commission-drivers who distribute meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry cleaning for his/her principal.
- Full-time traveling or city salespersons who solicit on behalf of, and the transmission to, his/her principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

To be covered under Missouri Employment Security Law, an employee in one of the statutory employee categories must meet all the following requirements:

1. The worker must perform substantially all of the services personally.
2. The worker has no substantial investment in the facilities used in connection with the performance of the services (other than facilities for transportation).
3. The services are performed in a continuing relationship with the

person for whom the services are performed and are not in the nature of a single transaction.

Statutory Exempt Employees

There are several categories of employment under Missouri Employment Security Law that are exempted from coverage of UI benefits and therefore are not reportable for UI tax purposes.

Exempted Employment – General Business

Employment exempted from coverage under the law includes:

1. Persons under the age of 18 delivering newspapers or shopping news.
2. Direct sellers in the trade or business of delivering or distribution of newspapers or shopping news.
3. Direct sellers engaged in the business or trade of selling or soliciting sales of consumer products in a home, or otherwise than in or affiliated with a permanent fixed retail establishment, if 80 percent of remuneration received is directly related to such sales rather than the number of hours worked and sales are performed under a written contract that provides the seller will not be treated as an employee for federal tax purposes.

4. Services performed in the employ of a son, daughter, spouse, or by a child under the age of 21 in the employ of the child's father or mother. This includes legally adopted, step, and foster children and parents.
5. Services as a licensed insurance agent, licensed insurance broker, or an insurance solicitor remunerated solely by commissions.
6. Services for which academic credits are given if performed by an individual who is a student enrolled in a public or nonprofit school.
7. Effective August 28, 2010, services of a licensed real estate salesperson or licensed real estate broker are exempt when substantially all of the remuneration in the pay period, whether or not paid in cash, is directly related to sales or other output (including the performance of services) performed pursuant to a written contract. Remuneration is based on services performed, rather than the number of hours worked. Prior to August 28, 2010, services of a licensed real estate salesperson or licensed estate broker, provided at least 80 percent of remuneration for services are directly related to sales performed rather than the

number of hours worked, and the services are performed under a written contract that provides the individual will not be treated as an employee for federal tax purposes.

8. Services performed in a barber or beauty shop by an individual who pays rent or other payments to the owner or operator for use of the facilities.
9. A motor carrier whose operations meet the provisions of Section 288.035 of the Missouri Revised Statutes (RSMo).
10. Services performed in the employ of a foreign government.
11. Workers covered by a federal UI system (railroad workers and federal employees).
12. Full-time student working less than 13 weeks for an organized summer camp.

Exempted Employment – Churches and Religious Orders

1. Services performed in the employ of a church, convention, or association of churches.
2. Services performed in the employ of an organization that is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church, convention, or association of churches.

3. Services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of the ministry.
4. Services performed by a member of a religious order in the exercise of duties required by such order.

Exempted Employment – 501(c)(3) Organizations and Government Entities

1. Services performed by individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, if performed in a facility conducted for carrying out a program for rehabilitation of such individuals.
2. Services performed by individuals who because of impaired physical or mental capacity cannot readily be absorbed in the competitive labor market, if performed in a facility whose purpose is to carry out a program of providing work for such individuals.
3. Services performed by an individual receiving work-relief or work-training if the program is assisted or financed in whole or in part by a federal agency or by an agency of the state or any of its political subdivisions.
4. Services performed in the employ of a non-profit school, college, or university by a student who is enrolled and regularly attends

classes at such school, college, or university.

5. Services performed by a student's spouse in the employ of a non-profit school, college, or university at which the student is enrolled and regularly attends classes provided the spouse is advised at the beginning of such services that:
 - a. The employment is provided under a student financial assistance program; and
 - b. The employee is not covered by any program of UI.
6. Services performed by an inmate of a custodial or penal institution.
7. In the employ of a governmental entity if such service is performed by an individual in the exercise of duties:
 - a. As an elected official;
 - b. As a member of a legislative body or a member of the judiciary of a state or political subdivision;
 - c. As a member of the state national guard or air national guard;
 - d. As a temporary employee due to fire, storm, snow, earthquake, flood, or similar emergency;
 - e. In a position designated by the laws of this state as a major non-tenured policy-making or advisory position;

- f. In a position designated by the laws of this state as a policy-making or advisory position in which the duties ordinarily do not require more than eight hours per week; and
- g. As an election judge, who is appointed by the election authority, receiving less than \$1,000 during the calendar year.

Required Notice to Non-Covered Workers

If an employee of a church, religious order, or non-profit 501(c)(3) organization is exempt from UI coverage as defined under Section 288.041 RSMo, a written notice is required from the employer to the exempted workers. The notice must state that wages earned by the individual will not be used to determine insured worker status for UI benefits. The notice must be provided to each individual at the time of initial employment or upon a change in the status of the employing unit's liability regarding UI coverage.

Voluntarily Elects Coverage

None of the above exclusions apply when the employer's voluntary election of coverage under Section 288.080 RSMo is approved by the DES.

Contact Information

For additional information or questions, call 573-751-3340

or

visit the DES website at:

[www.labor.mo.gov/DES/Employers/
reportable.asp#independ_contract](http://www.labor.mo.gov/DES/Employers/reportable.asp#independ_contract)

Relay Missouri:

If calling by home phone or cell phone, dial “711.” All other callers should dial 800-735-2966.